No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

An indictment was returned on the 28th day of January, 1943, charging the appellant with failure to perform a duty required of him under the Selective Training Act of 1940, 50 U. S. C. 311, in that he failed and neglected to report for work of national importance under civilian direction, having been duly assigned by his Local Board to work of national importance under civilian direction, and having been duly ordered and notified to report for said work of national importance under civilian direction (T. R. 2, 3, 4, 5).

A motion to quash the indictment was denied February 17, 1943 (T. R. 5, 6). The case was tried before a

jury on April 9, 1943. At the end of the trial, appellant made a motion for a directed verdict, which was overruled. The appellant was found guilty as charged (T. R. 6).

Notice of appeal was filed April 19, 1943 (T. R. 10).

Said appellant, Jarmon Thomas Conway, registered under the Selective Training and Service Act of 1940, Title 50 U. S. C. A. 301-311, on October 16, 1940 (T. R. 19). He was thereafter classified as IV-E by his Local Selective Service Board at Glendale, Arizona, on October 28, 1941, for the reason that he was a conscientious objector, from which classification appellant appealed to the Board of Appeals, which, on January 23, 1942, classified the appellant in Class IV, Subdivision E, by the following vote Ayes 5 noes 0 (T. R. 22). Appellant was thereafter assigned to work of national importance (T. R. 46), and subsequent thereto, on May 4, 1942, he was ordered to report for work of national importance to his Local Board on May 14, 1942 (T. R. 47). Appellant failed so to do (R. T. 22, 52).

Appellant, in addition to his statements in his questionnaire supporting the basis for his claim as a minister, also included therein the following (Government's Exhibit 2 in Evidence, T. R. 20, 21):

> "I am working at present time. The job I am working at now is nursery man. My duties are plant shrubbery, grade lawns, etc. I have done this kind of work for 2 years. * * * My employer is Norman Nurseries, 2508 N. Central Avenue, Phoenix, Arizona, whose business is Nursery Business. Other business or work in which I am now engaged is preaching the gospel. I am licensed as truck and tractor driver. I am not an apprentice. * * * Nursery man planting shrubs, Etc. 1937 to 1941."

Appellant also included in a special form for conscientious objectors, being Form 47, the following statements (T. R. 28, 30):

> "Farm work, Employer, Arthur W. Conway, Father, * * * 1936. Farm Work Employer Chas. Pearson, Paducah, Texas, 1936 to 1937. Farm Work J. C. Rodgers, 20th and Campbell Ave. 1937 to 1938. Farm Work, Norman Nurseries, 2508 N. Central, Phoenix, 1938 to 1941."

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in admission of certain evidence.

3. Whether the Court erred in denying motion of appellant for a directed verdict.

4. Whether the Court erred in instructing the jury.

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. 1 (App. B. 18, 19)

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every essential element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 19) merely reaffirm this principle.

The indictment in this case contains allegations of all the elements of the cirme. It alleges that appellant registered under the Selective Training and Service Act of 1940, that he was classified by the Board as IV-E, that

he was a person liable for training and service under the said Selective Service Act, and that he was duly notified by said Board to report at a specified time and place for work of national importance under civilian direction, and that the action of said Local Board was pursuant to the power conferred upon it by the Selective Training and Service Act of 1940. The indictment further states that the said Local Board was created in Maricopa County, Arizona, under and by virtue of the provisions of said Act. The offense charged is that he failed to perform a duty required of him, namely, to report to his Local Board for work of national importance under civilian direction, as required to do by the said notice and order of his said Board.

50 U. S. C. 311.

The offense is directly alleged in the indictment (T. R. 2, 3), and fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense. See the following cases:

Moore v. U. S., 128 Fed. 2d 974.
Zuziak v. U. S., 119 Fed. 2d 140 (9 Cir.).
Graham v. U. S., 120 Fed. 2d 543.
Woolley v. U. S., 97 Fed 2d 258 (9 Cir.).
Harvey Ward Crutchfield v. U. S., No. 10,200, 9 Cir.
U. S. v. Henderson (C. C. A. D. C. 1941), 121 Fed. 2d 75.
Potter v. U. S., 155 U. S. 438.
Summers v. U. S. (C. C. A. 4, 1926), 11 Fed. 2d 583; certiorari denied 271 U. S. 681.
Hewitt v. U. S. (C. C. A. 8, 1940), 110 Fed 2d 1, 6.
Hagner v. U. S., 285 U. S. 427, 431.
Beard v. U. S. (App. D. C.), 82 Fed. 2d 837, 840.

From a perusal of the indictment and a reading of the cases cited in support of our position, we believe the indictment is good and that the Court did not err in denying appellant's said motion to quash.

ASSIGNMENTS OF ERROR NOS. II AND III
(App. B. 19, 20, 27)

These assignments have to do with the appellant's objections to the admission in evidence of Government's Exhibits Nos. 7 and 11, and we will consider them together.

Government's Exhibit No. 7 is a letter from Mr. A. M. Tuthill, State Director of Selective Service for the State of Arizona, to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona (T. R. 43).

Government's Exhibit No. 11 is a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System, to Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the appellant and affirming his classification in Class IV-E (T. R. 54).

At the trial before the District Court the appellant objected to the admission of said exhibits as being immaterial, which objections were overruled by the Court (R. T. 16, 44). The exhibits were not introduced by the Government during the trial for the purpose of proving or disproving the status of the appellant as a minister, nor were they introduced upon the issue of whether or not the appellant should have been classified IV-E or IV-D, but were introduced only for the purpose of showing to the Court and the jury the parts of the record that were before both the Local Board and the Appeal Board at the time of their respective hearings re-

garding the classification of appellant, and to further show that the respective boards really considered his case upon the record contained in appellant's file.

We therefore contend that the exhibits were material to the issues before the Court and that the Court did not err in overruling appellant's objections.

ASSIGNMENT OF ERROR NO. IV (App. B. 29)

This assignment of error claims that the Court erred in sustaining the Government's objection to the introduction in evidence of appellant's Exhibit A, being some 47 affidavits of Jehovah's Witnesses affirming the fact that the affiants regarded the appellant as a minister, for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6, directing the appellant to appear for work of national importance under civilian direction, was unlawful in that it violated the rules of the Selective Service System by wrong classification of a registrant and issuance of orders pursuant to such unlawful classification. We do not believe there is any merit to appellant's contention under his Assignment of Error No. IV for the reason that the appellant cannot disobey the Board's orders and then defend his dereliction in a criminal trial by collaterally attacking the Board's administrative acts, and we cite the following cases in support of the above premise:

U. S. v Grieme (C. C. A. 3), 128 Fed. 2d 811.
Rase v. U. S. (C. C. A. 6), 129 Fed. 2d 204.
U. S. v. Kauten (C. C. A. 2), 133 Fed. 2d 703.
U. S. v. Mroz (C. C. A. 7), 136 Fed. 2d 221, decided June 3, 1943 (Advance Sheet, August 16, 1943).

It is obvious upon a reading of the above-cited cases that the Court committed no error in sustaining the

Government's objection to the introduction in evidence of appellant's Exhibit A.

ASSIGNMENT OF ERROR NO. V (App. B. 30)

Appellant bases this assignment of error upon the grounds that the Court erred in denying motion of appellant for a directed verdict, said directed verdict having been requested by the appellant for the reason that appellant's Local Board had found him fit for general service (T. R. 25, 26, 27), which automatically put the appellant under the Selective Service regulations as an inductee in the non-combatant service in the armed forces.

We are unable to understand the premise upon which the appellant bases his Assignment of Error No. V. The indictment in this case specifically alleges that the appellant was classified IV-E by his Local Board (T. R. 2); the record shows that the appellant was classified IV-E by his Local Board (T. R. 22), which classification was also made by the Appeal Board (T. R. 22); and he was assigned to work of national importance under civilian direction (T. R. 46) for the reason that he was conscientiously opposed to both combatant and non-combatant military service. This was mandatory under and by virtue of Regulation 622.51 of the Selective Service Manual, which Regulation makes it mandatory that every registrant who has been classified IV-E be available for work of national importance.

From the pleadings, the record, and the transcript of evidence in this case, we argue most strenuously that the Court properly denied appellant's motion for a directed verdict.

ASSIGNMENT OF ERROR NO. VI (App. B. 33)

The appellant claims in his Assignment of Error No. VI that the Court erred in refusing to give to the jury the defendant's requested instructions, and further erred in the Court's instructions to the jury to the effect that the defendant cannot offer as defense that the order of the Board is arbitrary and capricious, and in support thereof cites certain cases (App. B. 35), which we have read and find that they are of no assistance in determining the issues raised by appellant under his said assignment of error. However, the case of *Ex parte Stewart, 47 Fed. Supp. 410,* one of the cases cited by appellant, clearly holds that the method to be taken advantage of in cases of this nature is under and by virtue of a writ of habeas corpus because of the fact that no question of the action of the Board is allowed in a prosecution resulting from disobedience of any orders issued by the Board.

It is our contention that the Judge's instruction (R. T. 58, 59), claimed as error by appellant in this case, correctly states the law, and in support of the instruction we cite the following cases:

Ex parte Stewart, supra.
U. S. v. Johnson (C. C. A. 8), 126 Fed 2d 242-246.
U. S. v. Grieme, supra.
Rase v. U. S., supra.
U. S. v. Kauten, supra.

We also contend that from the cases cited above the appellant's requested instructions did not correctly state the law, and that the Court did not commit error in refusing to give his instructions to the jury.

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

The Court did not err in the reception or rejection of evidence.

The Court properly denied appellant's motion for a directed verdict.

Appellant had a fair and impartial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

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